No. 09-814

IN THE

Supreme Court of the United States

GORTHO, LTD.,

Petitioner,

v.

AUTO-OWNERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has failed to present a compelling reason to grant the Petition, where the Seventh Circuit Court of Appeals acted within its sound discretion and denied Petitioner's request to certify an insurance coverage question to the Iowa Supreme Court in the absence of controlling Iowa precedent, and where the Seventh Circuit predicted how the Iowa Supreme Court would rule on the coverage issue, in accordance with this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

II. Whether Petitioner has failed to present a compelling reason to grant the Petition, where the impact of the Seventh Circuit's Opinion is limited to insurance coverage disputes filed in the Seventh Circuit which concern claims brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227, and which involve the application of Iowa law.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Auto-Owners Insurance Company is a Michigan corporation. Respondent's parent corporation is Auto-Owners Insurance Group, which is also a Michigan corporation. No publicly held company owns more than 10% or more of Auto-Owners Insurance Group's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
REASONS FOR DENYING THE PETITION	7
I. THE SEVENTH CIRCUIT'S REFUSAL TO CERTIFY THE QUESTION TO THE IOWA SUPREME COURT IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.	7
A. The Seventh Circuit's Decision To Deny Certification To The Iowa Supreme Court Is Consistent With *Erie*.	10
1. Certification is not required under *Erie*.	11

Contents

Page

2. *Erie* allows a federal court to predict state law where the issue is undecided in that state. 13

3. The Seventh Circuit's Opinion did not promote forum-shopping or an inequitable administration of the laws. 17

II. THE PURPORTED LONG-REACHING IMPACT OF THE SEVENTH CIRCUIT'S PREDICTIONS OF IOWA LAW IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI. 19

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Casualty & Sur. Co. v. L. K. Comstock & Co.,
684 F.2d 1267 (9th Cir. 1982) 14

Allstate Ins. Co. v. Menards, Inc.,
285 F.3d 630 (7th Cir. 2002) 14

American States Insurance Co. v. Capital Associates,
392 F.3d 939 (7th Cir. 2004) 4, 15, 16, 18

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 9

Auto-Owners Insurance Co. v. Websolv,
580 F.3d 543 (7th Cir. 2009) 3, 4, 5, 6, 12

A.Y. McDonald Industries, Inc. v. Ins. Co. of North America,
475 N.W.2d 607 (Iowa 1991) 4

Bovee v. Coopers & Lybrand C.P.A.,
272 F.3d 356 (6th Cir. 2001) 14

Burris Chem. v. USX Corp.,
10 F.3d 243 (4th Cir. 1993) 13

Butz v. Glover Livestock Commission Co.,
411 U.S. 182 (1973) 9

Cited Authorities

Page

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 10

DeWeerth v. Baldinger,
38 F.3d 1266 (2d Cir. 1994) 13

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) ..... *passim*

Hanna v. Plumer,
380 U.S. 460 (1965) 10

In re Badger Lines, Inc.,
140 F.3d 691 (7th Cir. 1998) 12

Jewelcor Inc. v. Karfunkel,
517 F.3d 672 (3d Cir. 2008) 13

Kibbee v. State Farm Fire & Cas. Co.,
525 N.W.2d 866 (Iowa 1994) 15, 16

Klaxon Co. v. Stentor Elec. Mfg. Co.,
313 U.S. 487 (1941) 17, 18

Kunelius v. Town of Stow,
588 F.3d 1 (1st Cir. 2009) 13

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 8

Cited Authorities

Page

Lehman Bros. v. Schein,
416 U.S. 386 (1974) 9

NASCO, Inc. v. Calcasieu Television & Radio, Inc.,
894 F.2d 696 (5th Cir. 1990) 10

Northrop Grumman Ship Sys. v. Ministry of Def.,
575 F.3d 491 (5th Cir. 2009) 14

Penzer v. Transportation Ins. Co.,
545 F.3d 1303 (11th Cir. 2008) 6

Plastics Engineering Co. v. Liberty Mut. Ins. Co.,
514 F.3d 651 (7th Cir. 2008) 12

Smigiel v. Aetna Casualty & Surety Co.,
785 F.2d 922 (11th Cir.1986) 14

State Farm Mut. Auto. Ins. Co. v. Pate,
275 F.3d 666 (7th Cir. 2001) 12

Takahashi v. Loomis Armored Car Service,
625 F.2d 314 (9th Cir. 1980) 14

United Fire & Cas. Ins. Co. v. Fenton, L.L.C.,
328 F.3d 411 (8th Cir. 2003) 14

Cited Authorities

Page

Wankier v. Crown Equip. Corp.,
353 F.3d 862 (10th Cir. 2003) 14

West v. American Tel. & Tel. Co.,
311 U.S. 223 (U.S. 1940) 13, 16

Valley Forge Ins. Co. v. Swiderski Electronics, Inc.,
860 N.E.2d 307 (Ill. 2006) 4, 15, 18

Statutes:

Illinois Consumer Fraud Act,
815 ILCS § 505/2 1

Telephone Consumer Protection Act,
47 U.S.C. § 227 ..... i, 1

Rule:

Supreme Court Rule 10 7

STATEMENT OF THE CASE

Respondent submits this Statement of the Case to address any misstatement of fact or law in the Petition for Writ of *Certiorari* that bears on what issues properly would be before the Court if *certiorari* were granted.

On April 14, 2006, Auto-Owners filed a declaratory judgment action in the United States District Court for the Northern District of Illinois, seeking a declaration that it owed no duty to defend or indemnify its insureds Websolv Computing, Inc. ("Websolv") and Uday Om Ali Pabrai ("Pabrai"), against Cause No. 03 CH 15615, filed against Websolv and Pabrai in the Circuit Court of Cook County, Illinois. The underlying suit alleged that on February 21, 2003, Guy Bibbs ("Bibbs"), a dentist, received an unsolicited and unauthorized fax advertisement from Websolv and Pabrai regarding HIPAA compliance and training seminars (R. Doc. 1 at Ex. 2). Bibbs brought the action on behalf of a class of more than 50 additional similarly-situated persons and alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), common law conversion, violations of the Illinois Consumer Fraud Act, 815 ILCS § 505/2, and "property damage" (R. Doc. 1 at Ex. 2).

Websolv is an Iowa corporation, with its principal place of business in Clive, Iowa. (R. Doc. 1, p. 2). Pabrai is a citizen of the State of Illinois, who resides in Aurora, Illinois (R. Doc. 1, p. 3). Bibbs is a citizen of the State of Illinois (Doc. 1, p. 4). Gortho, Ltd. ("Gortho"), Bibbs' professional corporation, later substituted in for Bibbs in the underlying suit, because the fax machine at issue was owned by Gortho (R. Doc. 40-1, Ex. 1 at 2-3).

On November 1, 2006, Bibbs filed a "Motion to Certify Question of Iowa Law to Iowa Supreme Court," arguing that "the present matter relates to a policy issued in Iowa to an Iowa company, thus calling for application of *Iowa* law" (R. Doc. 20-1, p. 4; emphasis in original). Auto-Owners filed a response, agreeing that Iowa substantive law controlled the interpretation of the policy, but disputing that the case was appropriate for certification to the Iowa Supreme Court (R. Doc. 23-1).

On February 7, 2007, the District Court denied Bibbs' motion to certify, holding that "the fundamental issue the court must decide in the pending summary judgment motion will deal with basic contract law," and that "[t]he court is not persuaded that because counsel have found no law in the Iowa state court that speaks directly to whether an insurer has a duty to insure a policy holidy [sic] for violations of the TCPA, that this is enough to justify a certification to the Iowa Supreme Court." (R. Doc. 27-1).

On August 31, 2007, after the parties filed cross-motions for summary judgment, the District Court issued a memorandum opinion denying Auto-Owners' motion for summary judgment and granting Defendants' motion for summary judgment (Doc. 52-1; Doc. 53-1; A.1-8). The District Court concluded that Illinois law governed despite the parties' stipulation that Iowa law applied (Doc. 53-1; A.1-8). Auto-Owners appealed.

The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and

remanded the matter with instructions to enter summary judgment in favor of Auto-Owners. *Auto-Owners Insurance Co. v. Websolv*, 580 F.3d 543, 552 (7th Cir. 2009).

On appeal, Gortho asked the Circuit Court to certify the coverage question to the Iowa Supreme Court because there was no pertinent Iowa caselaw on the question whether a commercial general liability (CGL) insurance policy covers alleged violations of the TCPA. *Websolv*, 580 F.3d at 549, n3. The Court rejected Gortho's request for certification, stating:

> "Certification is appropriate only when '"the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to [decide] . . . the issue."' *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) (quoting *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998)). While the issue is certainly outcome-determinative, it is hardly one of vital public concern. Furthermore, the issue is not likely to recur. As both parties acknowledge, the insurance industry in 2005 began issuing a standard endorsement specifically excluding coverage for TCPA claims. As this issue only arises in cases involving insurance contracts issued before 2005, it is not worthy of certification." *Websolv*, 580 F.3d at 549, n3.

The Seventh Circuit further observed that while there was no Iowa precedent on the exact question whether the "advertising injury" coverage in the CGL policy required Auto-Owners to defend Websolv in a suit claiming an infringement of Gortho's seclusion interests derived from the TCPA, it faced the same "advertising injury" question under Illinois law in *American States Ins. Co. v. Capital Associates*, 392 F.3d 939 (7th Cir. 2004), which held that under Illinois law, the insurer had no duty to defend against seclusion-type claims. *Websolv*, 580 F.3d at 550, citing *American States*, 392 F.3d at 943. The Seventh Circuit noted that subsequent to its decision in *American States*, the Supreme Court of Illinois decided *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307 (Ill. 2006), which held that in Illinois, advertising-injury policy provisions cover claims brought under the TCPA. *Websolv*, 580 F.3d at 550.

Even though Illinois had since taken a different approach, the Seventh Circuit concluded that Iowa was "more likely to adopt [its] interpretation rather than the one adopted by the Illinois Supreme Court [in *Valley Forge*]." *Websolv*, 580 F.3d at 550. In so holding, the Court reasoned:

> "It is true that Iowa, like Illinois, gives undefined words in an insurance contract their ordinary meaning. *A.Y. McDonald Indus., Inc. v. Ins. Co. of North America*, 475 N.W.2d 607, 618 (Iowa 1991). However, Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions. *Kibbee v. State*

> *Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). We continue to read the policy's use of the word 'publication' in the advertising-injury definition to narrow the scope of the 'privacy rights' referred to in the same clause. The provision provides coverage for 'oral or written publication of material that violates a person's right of privacy.' The most natural reading of this language is that it covers claims arising when the insured publicizes some secret or personal information—not claims arising when the insured disrupts another's seclusion." *Websolv*, 580 F.3d at 550.

Thereafter, the Seventh Circuit addressed Websolv's assertion that Gortho's claims amounted to claims for property damage and triggered coverage where the unsolicited fax advertisement used ink and paper from Gortho's fax machine. The Court held that while the one-page fax advertisement used a small amount of ink and one sheet of paper from Gortho's machine, such damage was excluded from coverage because it was both expected and intended by Websolv, and the policy excludes damage that is expected or intended by the insured. *Websolv*, 580 F.3d at 551. In reaching this conclusion, the Court rejected Websolv's position that the policy's "separation of insureds" provision required the Court to evaluate the alleged property damage from the perspective of the company separately from the perspective of the insured. *Websolv*, 580 F.3d at 552. The Seventh Circuit noted that the "separation of insureds" clause did not help Websolv

because Gortho's complaint alleged that Websolv sent the fax and that Pabrai merely "authorized and approved" it. *Websolv*, 580 F.3d at 552.

SUMMARY OF ARGUMENT

Petitioner presents no "compelling reasons" to grant its Petition for Writ of *Certiorari*. Petitioner asserts that the Seventh Circuit's decision conflicts with the Eleventh Circuit in *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008), and involves questions of exceptional importance in that the approach of the Seventh Circuit violates this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and does so in a manner that has resulted in abuse and is likely to result in further abuse by insurance companies. These allegations plainly involve principles the settlement of which is inconsequential to the public and only important to the parties. Further, there is no embarrassing conflict of opinion and authority between the Seventh Circuit and Eleventh Circuit courts of appeal where the former exercised its sound discretion and denied certification of a question to the Iowa Supreme Court and the latter exercised its sound discretion and granted certification of a question to the Florida Supreme Court.[1] Moreover, the Seventh Circuit did not violate *Erie* or principles of federalism when it denied Petitioner's request to certify the question to the Iowa Supreme Court where certification is not mandatory, where the Seventh Circuit predicted how the Iowa Supreme Court would decide

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[1] The Florida Supreme Court issued its opinion on January 28, 2010. *Penzer v. Transportation Ins. Co.*, No. SC08-2068, slip op. (January 28, 2010).

the issue in the absence of Iowa precedent, and where the Opinion did not promote forum-shopping or an inequitable administration of the laws.

Petitioner also contends that the Seventh Circuit's Opinion will have long-reaching impact even though the coverage issues are limited to TCPA claims likely arising out of occurrences before 2005, when the insurance industry began issuing standard endorsements specifically excluding coverage for claims brought under the TCPA. The Seventh Circuit's Opinion is further restricted to TCPA coverage issues involving the application of Iowa law. Petitioner has not presented this Court with a compelling reason to invoke its *certiorari* powers and, as a result, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I.

THE SEVENTH CIRCUIT'S REFUSAL TO CERTIFY THE QUESTION TO THE IOWA SUPREME COURT IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

Supreme Court Rule 10 (Sup. Ct. R. 10) sets forth the considerations governing review on *certiorari*. Rule 10 provides that "a petition for writ of *certiorari* will be granted only for compelling reasons," and that the decision to grant or deny review on writ of *certiorari* is within this Court's sound discretion. Sup. Ct. R. 10. While several factors indicate the character of the

reasons the Court considers, Petitioner seeks review on writ of *certiorari* under the following factor:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.] Sup. Ct. R. 10(a).

As this Court has observed in the past,

> "it is very important that we be consistent in not granting the writ of *certiorari* except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

This case does not warrant review upon writ of *certiorari* because the Petitioner presents no unsettled principles of public importance, nor does there exist an

"embarrassing conflict of opinion and authority" between the Seventh Circuit and Eleventh Circuit courts of appeal. Instead, the unexceptional issue at hand is whether the Seventh Circuit should have granted Petitioner's request to certify to the Iowa Supreme Court the question whether TCPA claims trigger coverage under an insurance policy's "advertising injury" provision, where the Eleventh Circuit in *Penzer* granted certification of a similar issue. Certification allows a federal court faced with a novel state-law question to put the question directly to the State's highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). This Court has held that it is within the sound discretion of the federal court to grant or deny certification. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Thus, the Seventh Circuit decision not to grant Petitioner's request for certification is not a compelling reason for *certiorari* review where the question involves application of well-settled principles to a relatively familiar situation, *i.e.*, certification of a question to a state's highest court, and has little significance except for the parties. *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 189 (1973) (dissenting opinion).

Petitioner claims the issue is worthy of review upon *certiorari* because the Seventh Circuit violated this Court's holding in *Erie* by refusing to grant it certification. Petitioner's implication of *Erie* is merely a veiled attempt to bring significance to an inconsequential issue. For the reasons that follow, there is no *Erie* violation and this Court should deny the Petition.

A. The Seventh Circuit's Decision To Deny Certification To The Iowa Supreme Court Is Consistent With *Erie*.

In *Erie*, this Court held that there is no federal common law and that federal courts must apply the law of the State except in matters governed by the Federal Constitution or Acts of Congress. *Erie*, 304 U.S. at 78. *Erie* further held that: "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Erie*, 304 U.S. at 78. This Court has described the twin aims of *Erie* as (1) discouragement of forum-shopping and (2) avoidance of inequitable administration of the laws. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991), citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). In other words, " '*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court.' " *Chambers*, 501 U.S. at 53, quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990).

The Seventh Circuit's decision to deny Petitioner's request for certification does not offend *Erie* for three reasons: (1) *Erie* does not mandate certification where state law is undecided; (2) the Seventh Circuit applied the law of the State by predicting how the Iowa Supreme Court would rule on the coverage issue where there was no controlling Iowa precedent; and (3) the Seventh Circuit's Opinion does not promote forum-shopping or

an inequitable administration of the laws due to the limited scope of the issues decided. The Seventh Circuit's refusal to grant certification is not a compelling reason for this Court to grant review upon writ of *certiorari* and the Petition should be denied.

1. Certification is not required under *Erie*.

The Seventh Circuit's refusal to certify the question to the Iowa Supreme Court did not violate *Erie* because *Erie* does not require that a federal court must grant a party's request to certify a question to a state's highest court. Rather, *Erie* provides that a federal court must apply the law of the State, unless the matter is governed by the federal constitution or congressional acts. There is nothing in *Erie* to suggest that where the law of the State is unclear, a federal court must grant certification of the issue to the state's highest court. To the contrary, this Court has made the following observations with respect to the certification procedure:

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court." *Lehman Bros.*, 416 U.S. at 390-91.

Petitioner perceives a current trend that federal District Courts and Circuit Courts of Appeal have been increasingly relying on certification to ascertain

uncertain state law, but it critically fails to demonstrate that the Seventh Circuit violated *Erie* by exercising its sound discretion to deny certification *in this case.*

Notably, the Seventh Circuit did not abuse its discretion when it denied Petitioner's request for certification. The Seventh Circuit grants certification only when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to decide the issue. *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001); *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998). Here, the Seventh Circuit determined that the coverage question at issue was not worthy of certification because it was "hardly one of vital public concern. Furthermore, the issue is not likely to recur." *Websolv*, 580 F.3d at 549, n3. It is without question that the issue whether an advertising-injury provision in a CGL policy covers TCPA claims is neither compelling nor a matter of "vital public concern." *Cf. Plastics Engineering Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 661 (7th Cir. 2008) (holding what constitutes an "occurrence" in an insurance contract when exposure injuries are sustained by numerous individuals at varying geographical locations over many years was a question of vital public concern). Similarly, the issue is not likely to recur given the fact that in 2005, the insurance industry began issuing a standard endorsement specifically excluding coverage for TCPA claims. *Websolv*, 580 F.3d at 549, n3.

2. *Erie* allows a federal court to predict state law where the issue is undecided in that state.

The Seventh Circuit adhered to the rule promulgated in *Erie* by predicting how the Iowa Supreme Court would rule on the "advertising-injury" coverage issue absent Iowa precedent. Although this Court has not expressly stated that *Erie* allows federal courts to predict how the state's highest court would rule when there is no controlling state law, it implied as much in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (U.S. 1940), which held that "[s]tate law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule[.]" Furthermore, the vast majority of federal Circuit Courts of Appeal follow the principle that *Erie* contemplates in some instances, federal courts will be required to decide unsettled issues of state law. *See Kunelius v. Town of Stow*, 588 F.3d 1, 9 (1st Cir. 2009) ("Where no authoritative decision from the state court of last resort resolves an issue of state substantive law, we must predict, as best as we can, that court's resolution of the issue before us"); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir. 1994) (same); *Jewelcor Inc. v. Karfunkel*, 517 F.3d 672, 676 (3d Cir. 2008) (holding in diversity cases, where the applicable rule of decision is the state law, it is the duty of the federal court to ascertain and apply that law, even though it has not been expounded by the highest court of the state); *Burris Chem. v. USX Corp.*, 10 F.3d 243, 248 (4th Cir. 1993) (If there is no decision by the high court which is directly on point, "then we

must * * * predict how the high court would rule"); *Northrop Grumman Ship Sys. v. Ministry of Def.*, 575 F.3d 491, 501 (5th Cir. 2009) ("Exercising our duty under *Erie*, we predict that the Supreme Court of Mississippi would afford this same privilege to foreign sovereigns"); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001) ("If the state supreme court has not yet addressed the issue presented, this Court must predict how it would rule"); *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 635 (7th Cir. 2002)

> "If the mandate of *Erie* is to be satisfied and the law ultimately employed is to be the law of the state, the federal court, exercising its authority to hear diversity cases, must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal";

United Fire & Cas. Ins. Co. v. Fenton, L.L.C., 328 F.3d 411, 413 (8th Cir. 2003) ("When a state's highest court has not decided an issue, it is the task of this court to predict how the state supreme court would resolve the issue"); *Aetna Casualty & Sur. Co. v. L. K. Comstock & Co.*, 684 F.2d 1267, 1275 (9th Cir. 1982) ("Where the applicable state law is unresolved, * * * this court has a duty to 'use its own best judgment in predicting how the state's highest court would decide the case' (quoting *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir. 1980)); *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003) ("Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do"); *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922,

924-25 (11th Cir.1986) ("although we are *Erie* bound, we may exercise an option to make an educated guess as to how the [state] courts would resolve this issue").

In this case, the Seventh Circuit predicted how the Iowa Supreme Court would decide the advertising-injury issue because there was no controlling Iowa authority. Without the aid of Iowa law, the Seventh Circuit relied, in part, on *American States*, which held that under Illinois law, an advertising-injury provision did not cover TCPA claims because: it was unlikely that the "right to privacy" provision in a corporate insurance policy was meant to cover seclusion interests; and the use of the word "publication" made it more probable that the provision only covered claims involving secrecy interests. *Websolv*, 580 F.3d at 550. Even though the Illinois Supreme Court later disagreed with the Seventh Circuit's analysis in *American States* (*See Valley Forge*, 860 N.E.2d at 668-69 (holding under Illinois law, the term "publication" did not narrow the scope of "privacy rights")), the Seventh Circuit concluded that "Iowa [wa]s more likely to adopt [its] interpretation rather than the one adopted by the Illinois Supreme Court [in *Valley Forge*]." *Websolv*, 580 F.3d at 550. In coming to this conclusion, the Seventh Circuit reasoned that because Iowa refers to closely related or associated policy language to illuminate the meaning of insurance coverage provisions, the use of the word "publication" in the advertising-injury provision narrowed the scope of the "privacy rights" referred to in the same clause. *Websolv*, 580 F.3d at 550, citing *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). There is no question that the Seventh Circuit followed *Erie* by predicting how the Iowa Supreme Court would decide the advertising-injury issue.

Petitioner asserts that the Seventh Circuit created and imposed its own general common law by looking back to its decision in *American States*, which was not a correct prediction of Illinois law. Petitioner further contends that the Circuit Court reached its conclusion not by analyzing Iowa law, but by restating its own view of what the outcome should be and reiterating its "incorrect prognostication of Illinois law." Petitioner also claims that the Seventh Circuit should have found a duty to defend because Iowa and Illinois use almost identical methods to interpret insurance policies and Iowa is more pro-insured than Illinois. Petitioner's assertions are misguided.

Contrary to Petitioner's contention, the Seventh Circuit clearly analyzed the undecided coverage issue under Iowa law, not a general common law. Petitioner even admits that the Seventh Circuit "relied on *one* Iowa decision for the proposition that 'Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions.' *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994)." (Emphasis in original). The Seventh Circuit's reliance on *American States* and only *one* Iowa case does not reveal a propensity for a general common law but, instead, demonstrates the undisputed lack of Iowa precedent on the issue. As explained by this Court in *West*, "it is the duty of the [federal court] * * * to ascertain *from all the available data* what the state law is and apply it rather than to prescribe a different rule[.]" (Emphasis added.) *West*, 311 U.S. at 237. That is precisely what the Seventh Circuit did in this case. Last, whether the Seventh Circuit appropriately decided the coverage issue under

Iowa law cannot be put before the clear language in the Opinion indicating that the Seventh Circuit abided by *Erie* and applied what it predicted to be the law in Iowa. Petitioner's contentions that the Seventh Circuit violated *Erie* by creating and imposing its own common law are not compelling.

3. The Seventh Circuit's Opinion did not promote forum-shopping or an inequitable administration of the laws.

This Court accomplished the two goals of *Erie* – discouragement of forum-shopping and avoidance of inequitable administration of the laws – by requiring uniformity between "coordinate state and federal courts sitting side by side." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Here, in the absence of Iowa precedent, the Seventh Circuit followed this Court's direction and coordinated with the Iowa state court by predicting that the Iowa Supreme Court would conclude that an advertising-injury provision does not cover claims brought under the TCPA. Petitioner nonetheless claims:

> "The Seventh Circuit, by finding that there is no relevant Iowa law and then setting forth its own law, has effectively prevented Iowa from deciding the issue and invited insurers to continue to file these types of cases in federal forums in order to gain the advantage of such precedent and has accomplished just what this Court has long sought to curtail."

Petitioner's theory lacks merit in the face of *Valley Forge*, where the Illinois Supreme Court abrogated *American States* and held that the Seventh Circuit did not accurately predict the advertising-injury issue under Illinois law. So too here. If the Iowa Supreme Court finds fault with the Seventh Circuit's Opinion, it can issue its own opinion abrogating *Websolv*; however, if the Iowa Supreme Court finds no fault with the Seventh Circuit's Opinion, it may do nothing, thereby guaranteeing a litigant that if he takes his state law cause of action to federal court in the Seventh Circuit, the result in his case will be the same as if he had brought it in Iowa. *See Chambers*, 501 U.S. at 53.

Regardless, any potential problem with forum-shopping in this case is limited by the narrowness of the issue, *i.e.*, whether, under Iowa law, an advertising-injury provision covers claims brought under the TCPA. Petitioner suggests that insurers "can create diversity at will," and that they are manipulating jurisdiction in order to take advantage of the Seventh Circuit's "general common law." Insurers do not "manipulate" jurisdiction, and they have little control over the substantive law applied by the federal court. *See Klaxon*, 313 U.S. at 496 (a federal court sitting in diversity must apply the choice-of-law rules of the forum state to determine which state's substantive law applies). Simply put, the forum-shopping issue raised by Petitioner is limited solely to insurance coverage disputes governed by Iowa law which involve claims brought under the TCPA. Not only is the state substantive law a limiting factor, so too is the endorsement excluding coverage for TCPA claims which insurers began inserting into insurance policies in 2005. Accordingly, the opportunity for insurers to "misuse

diversity jurisdiction" to obtain a more favorable forum in the Seventh Circuit is small, and therefore, forum-shopping is not a compelling reason that this Court should grant the Petition.

In the light of the foregoing, the Seventh Circuit's decision to deny Petitioner's request for certification to the Iowa Supreme Court did not offend this Court's decision in *Erie*. This Court should deny the Petition for Writ of *Certiorari* for failure to present a compelling reason to grant review upon *certiorari*.

II.

THE PURPORTED LONG-REACHING IMPACT OF THE SEVENTH CIRCUIT'S PREDICTIONS OF IOWA LAW IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

As previously explained, the impact of the Seventh Circuit's predictions of Iowa law is not long-reaching, but limited. The Seventh Circuit's Opinion only applies to coverage actions filed in the Seventh Circuit where the TCPA coverage question concerns the application of Iowa law. Petitioner confuses the issue by asserting that the Seventh Circuit's Opinion will impact the question whether in interpreting insurance policy provisions such as the advertising-injury clause, the reader is charged with technical, legal understanding. Petitioner's contention is not only incorrect and unsubstantiated, but also is contradicted by its later statement that the Seventh Circuit failed to "answer the key question of whether the reader of the associated policy language is assumed to understand technical legal concepts such as intrusion or seclusion."

In addition, Petitioner mistakenly claims that "another state issue likely to recur (completely distinct from coverage under 'advertising injury') is whether the separation of insureds clause requires a defense under the property damage coverage for such claim." This issue, like the advertising-injury issue, is tied to TCPA coverage disputes governed by Iowa law, and therefore, it is unlikely to recur. More importantly, the Seventh Circuit did not "wade[ ] into important issues of state law and policy," as urged by Petitioner, but instead, merely applied the plain language of the insurance policy's expected and intended damage exclusion to the allegations of the underlying complaint. *Websolv*, 580 F.3d at 551-52. In doing so, the Seventh Circuit observed that the separation of insureds clause was unhelpful to Petitioner because the underlying complaint alleged that Websolv sent the fax and that its employee Pabrai only "authorized and approved" it. *Websolv*, 580 F.3d at 552. Because the Seventh Circuit's analysis of the separation of insureds clause depended entirely on the specific facts alleged in the underlying complaint, there is no question that the issue has little significance except to the parties.

Accordingly, Petitioner has not presented a compelling reason for this Court to grant the Petition for Writ of *Certiorari* where the Seventh's Circuit's "predictions" of Iowa law will have limited impact.

CONCLUSION

For the foregoing reasons, the Petitioner has failed to establish any compelling reason for this Court to grant review upon writ of *certiorari*. Respondent respectfully requests this Court to deny the Petition.

Respectfully submitted,

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